IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 5-1-2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

S.A.Nos.485 and 486 of 2006
and
CMP Nos.6175, 6176, 10766 and 10767 of 2006

Sashikala
rep. By her power agent
K.Sridharan
No.14, Sriman Srinivasan Road
Alwarpet, Chennai 18. .. Appellant
in both appeals
(Plaintiff)

vs

1.S.A.Sahida Beevi
2.Dr.N.Srinivasan
3.V.Kanchana
4.R.Mahesh
5.T.M.Mohmd. Yousuf
6.M.Alarmel Mangai
7.K.Ramachandran
8.Y.C.Sarangan
9.S.Manavalan
10.J.Ernest
11.Rajeswari Mahadevan
12.K.Sathyanarayanan
13.V.Ramsamy
14.N.S.Suresh
15.T.Narayanasamy
16.N.Ramachandran
17.V.Srinivasan
18.C.Lakshmanan
19.K.S.Krishnamurthy
20.R.Natarajan
21.K.Chandran
22.K.Malathi
23.A.S.Bhaskaran
24.G.Chellappan
25.C.Nammalvar
26.P.V.Chittibabu
27.E.M.S.Devaki
28.E.M.Sudarsana Nachiappan
29.M.V.Vijaykumar

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30.Mumtaz Begum
31.Chandra Renganathan .. Respondents in both appeals (Defendants)

Second appeals preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree in A.S.Nos.478 and 452 of 2004 passed by the Additional District Judge, Fast Track Court No.V, Chennai, dated 21.3.2006 confirming the judgment and decree dated 5.8.2004 passed in O.S.No.11999/96 on the file of the II Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.S.V.Jayaraman
Senior Counsel
for Mr.N.Duraikannan

For Respondents : Mr.K.Sukumaran
for M/s.Umamaheswari
for RR5, 13, 19, 26 and 29

COMMON JUDGMENT

This judgment shall govern these two appeals.

2.The plaintiff aggrieved over the rejection of her request by both the Courts below in a suit for permanent injunction that the respondents/defendants should be restrained from interfering with her peaceful possession and enjoyment of the suit property and also the grant of a decree in the counter claim made by the respondents seeking permanent injunction against the plaintiff that she should not interfere with the possession and exclusive enjoyment of the suit property, has took it on two appeals. The first appellate Court affirmed the judgment of the trial Court. Hence, these two appeals at the instance of the plaintiff.

3.The plaintiff filed the suit for the above relief inter alia stating that she became the absolute owner of the suit property in R.S.No.1833/14 measuring 2 grounds and 244 square feet at Cutchery Road, Mylapore, by virtue of a settlement deed dated 9.8.1972, executed by one T.S.Sadasivam; that from the time onwards, she has been in possession and enjoyment of the same; that in order to develop the property, she demolished the old building; that now, it is a vacant site; that she has put up a small shed; that on the north, the property measuring 2 grounds and 650 square feet situated in R.S.Nos.1834/13 and 1833/16 at Kalvivaru Street, belonged to one Malini subramaniam and also the property measuring 2 grounds and 1634 square feet situated in R.S.No.1833/15 and 1834/3 at Kalvivaru Street, Mylapore, belonged to one Parvathi Srinivasan; that for the purpose of development, a sanctioned building plan was obtained from the M.M.D.A. and Corporation of Chennai, in which the suit property has been shown as a vacant site; that the promoter constructed a building in those two properties as per the sanctioned plan; that each of the defendant is owning a flat in the said building; that the

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defendants who have purchased the proportionate undivided share in the land, previously owned by Malini Subramaniam and Parvathi Srinivasan, under different sale deeds, do not have any right, title or interest in the suit property; that they are having access to their flats from Kalvivaru Street; that the plaintiff has not conveyed any portion of the suit property to them; that there were compound walls around the suit property; that on 10.11.1994, the defendants attempted to trespass into the suit property; that she lodged a police complaint, and under the circumstances, there arose a necessity to file the suit.

4.The suit was resisted by the defendants by filing a written statement stating that the suit property is a private road leading to Cutchery Road as found in the sale deed executed by one Sridharan, the power agent of the plaintiff, and two other owners of the land for the purpose of development; that the plan approved by the M.M.D.A. dated 21.9.1991 and filed by the plaintiff, shows the proposed residential flats at No.117 in R.S.No.1838/14, 1834/4 and 13, Cutchery Road, Mylapore; that the plan is signed by the plaintiff along with the two other owners; that the plan indicates the suit property as 33 feet approach road to Cutchery Road; that the agreement shows that the suit property is part and parcel of the building project; that on the basis of the legal opinion, the defendants purchased the undivided share in the property and entered into building agreements with Anand Builders owned by Sridharan and Kalasalingam; that they convinced all the flat owners that the suit property is the approach road for the building; that when the builder committed deviation, there arose legal proceedings; that one Ramji Subramaniam filed a writ petition in W.P.No.5618/93 wherein the said Sridharan filed an affidavit stating that all the three owners of Door Nos.117 and 118 sought permission for construction; that under the circumstances, Sridharan is estopped from making a contrary claim now; that when the Officials of the M.M.D.A. inspected the property, they found that the plaintiff had made obstruction on the approach road by putting bamboo doors and a small hut; that they also warned the flat owners that such obstruction is in violation of the planning permit and directed them to remove the same; that this was informed to Sridharan, who in turn along with some unlawful elements obstructed the approach road; that under the circumstances, the defendants gave a police complaint; that the defendants have no intention to grab or trespass into the properties of others; that the suit property is part of Anand Sarovar project; that this is the only entry for school children, ladies and elderly people to reach their apartments; that the plaintiff and two others made the entire property in one hotchpotch for the purpose of developing the Anand Sarovar building project and for getting approved plans; that the defendants cannot exclude a portion of the property forming part of the scheme; that the plaintiff has surrendered the suit property to the project; that the suit is speculative in nature; that under the circumstances, the defendants have filed a counter claim for permanent injunction against the plaintiff, and hence, the suit was to be dismissed and a decree may be granted in favour of the defendants for permanent injunction restraining the plaintiff from interfering with the exclusive possession and

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enjoyment of the suit property.

5.In the reply statement, the plaintiff has stated that she did not receive any consideration from the power agent; that it is not correct to state that the suit property is a private road leading to Cutchery Road; that the power agent did not convey the suit property or any portion of the same to the defendants; that she is the absolute owner in possession and enjoyment of the suit property; that Sridharan was also the power agent of Malini Subramaniam and Parvathi Srinivasan; that in the sale deeds executed by the power agent, the properties of Malini Subramaniam and Parvathi Srinivasan have been described as item No.1 of 'A' Schedule showing the suit property as the private road leading to Cutchery Road; that on an erroneous understanding of the boundaries, the defendants claim the suit property as their private road leading to Cutchery Road; that a perusal of the sketch annexed to the deed of settlement executed by the mother of Malini Subramaniam, would show that the private road leading to Cutchery Road was 16 feet wide lying in between the properties of the plaintiff and Malini Subramaniam; that the said 16 feet road leads to Cutchery Road via Kalvivaru Street; that the approved plan indicates the suit property as 33 feet approach road to Cutchery Road; that the power agent has not executed any sale deed to any of the defendants; that any recital in the agreement in favour of the defendants or the sale deeds could not confer or create any right for the defendants in the suit property; that at the time of construction, the suit property was excluded from the scheme; that neither the plaintiff nor her power agent at any time made any representation that the suit property is left vacant as an approach road for the defendants; that the defendants are not in possession of the suit property and not entitled to any decree as asked for in the counter claim, and hence, the counter claim is liable to be dismissed.

6.Both the suit and the counter claim were taken up together for trial. Necessary issues were framed. On trial, the trial Court dismissed the suit rejecting the plaintiff's case, and decreed the counter claim accepting the defence plea. Aggrieved, the plaintiff took the matter on two appeals. Both the appeals were taken up together by the Additional District Judge, Fast Track Court No.V, Chennai, in A.S.Nos.452 and 478 of 2004 respectively. On enquiry, both the appeals were dismissed, and hence, these appeals at the instance of the plaintiff before this Court.

7.At the time of admission, the following common questions of law were formulated in both the appeals for consideration:

(1) Whether there can be any constructive estoppel against the true owner of the property when a builder made an advertisement in respect of the property?

(2) Whether in the absence of procedures contemplated under Section 54 of Transfer of Property Act, the right and title over the suit property will extinguish?

(3) Whether without a valid sale consideration, can any third party lay claim over the property?

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8.Advancing his arguments on behalf of the appellant, the learned Senior Counsel would submit that it is an admitted position that originally, there was a dilapidated house in the property; that the property came to the hands of three persons i.e., the plaintiff and also the other two namely Malini Subramaniam and Parvathi Srinivasan, by way of settlement deeds under Exs.A2, A4 and A5 respectively; that it is also true that all of them joined together and entered into an agreement for promotion of the property under Ex.B4, the sale agreement, dated 16.4.1990, following which a plan was put forth for approval by M.M.D.A.; that the same has also been approved; that in that plan, the suit property situated in R.S.No.1833/14, is shown as a vacant site; that it is not shown either as a road or as a passage leading to Cutchery Road as contended by the defendants; that the property was retained as a vacant site; that apart from this, all these respondents/defendants have purchased the property, after the same being promoted by way of flats; that a perusal of the sale deed, Ex.A8, would clearly indicate that there are two items of properties shown; but, it does not refer to item No.3 as shown in the original plan, which belonged to the plaintiff either, or Ex.A8 does not refer to the property of the plaintiff as a passage leading to Cutchery Road or not even a right is conferred upon the vendors namely the respondents/defendants to pass through the property of the plaintiff; that under such circumstances, the plaintiff has retained the property as a vacant site even at the time of the agreement and also at the time of the plan, on the basis of which, the M.M.D.A. has approved the plan; that now, the defendants cannot make any claim over the property of the plaintiff for more reasons than one; that firstly, the property was retained by the plaintiff; that the property was never shown as a passage either in the agreement or in the plan or in the sale deed, Ex.A8, in favour of the defendants; that apart from this, so long as it is not sold, but retained by the plaintiff, the defendants cannot claim either any right or interest over the property; that both the Courts below have not considered this aspect of the matter; and that once the title is retained by the plaintiff, merely because it was shown in the agreement and in the plan also, it cannot be stated that it was left as a passage under the scheme.

9.Added further the learned Senior Counsel that the property was neither gifted nor shown as a passage, but only retained as a vacant site; that all these would be indicative of the fact that the property was not meant to be used as a passage as put forth by the respondents/defendants' side; that in such circumstances, both the Courts below have not considered either the factual position or the legal position, but have dismissed the suit; that apart from that, both the Courts have also given unnecessary weight and evidentiary value to the documents, Exs.X1 to X4, which were produced from the M.M.D.A.; that Ex.B5 is also an affidavit filed by the plaintiff as an opposite party before the Consumer Redressal Forum, where these documents were thoroughly relied for the decision of the case; that so far as Exs.X1 to X4 were concerned, it is pertinent to point out that the property of the

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plaintiff is shown as a vacant site and not as a passage; that under the circumstances, at no stretch of imagination, it can be considered as part and parcel of the scheme, and therefore, it should be maintained by way of a trust by the plaintiff; that apart from that, so far as Ex.B5 was concerned, it was a claim made by one of the purchasers of the flat that there was a deviation of the plan, in which the plaintiff was also added as party; that the affidavit filed by the plaintiff in those proceedings, will have no bearing to the present case; that both the Courts below have erroneously rejected the claim of the plaintiff; that under the circumstances, it is a fit case where injunction has got to be granted against the respondents/defendants since she is the title holder of the property and the defendants cannot have a right to pass through, and hence, the counter claim should be rejected.

10.Countering the above contentions, the learned Counsel for the contesting respondents would submit that it is an admitted position that an agreement was entered into by all the three owners including the plaintiff, under Ex.B4 in 1990; that in the same, it has been clearly stated that all have joined together; that following the same, a plan was also placed before the M.M.D.A. for approval; that an undertaking affidavit was also filed not only by the vendors of the plaintiff, but also by the other two owners, in which the plaintiff has also joined; that in the said understanding, she has clearly stated that part and parcel of the entire property including the property in question was also the subject matter for approval, on which the construction was to be raised; that had this piece of land been shown as a vacant site, the M.M.D.A. would not have approved the plan; and that having been a party for such approval, now, the plaintiff cannot be permitted to turn around to say that it was not part and parcel of the property under the scheme.

11.Added further the learned Counsel that a perusal of Exs.X1 to X4 would clearly cut the case of the plaintiff; that there was a claim petition filed by one of the flat owners as to the deviation of the plan, when the construction was made; that an affidavit has also been filed by the appellant, wherein it has been clearly mentioned that she has not retained any portion of the land in the entire property; and that having made such an affidavit before the appropriate legal forum, now the appellant is estopped from going against the same.

12.The learned Counsel would further add that in the instant case, once it was shown as part and parcel of the property and the plan having been approved, as flat owners, under Sec.6(2) of the Tamil Nadu Apartment Ownership Act, 1994, they are also entitled to have access through the same. It is further submitted by the learned Counsel that it is true that Ex.A8, the sale deed, speaks about only the items 1 and 2 and does not speak about item No.3; that the non-mention of item No.3 in the sale deed will not take away the rights of the respondents, which is available to them by way of application of Sec.6(2) of the said Act, since it has got to be inferred so.

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13.So far as the counter claim is concerned, the learned Counsel fairly conceded that their claim for exclusive possession may not stand; but, they have got a right to pass through to reach Cutchery Road, and to that extent, it has got to be ordered.

14.The Court paid its anxious consideration on the submissions made and also had a thorough scrutiny of the materials available. It is not in controversy that originally, there was a dilapidated house in the property, and by way of Ex.A4, one Parvathi Srinivasan and under Ex.A5, the other Malini Subramaniam became the owners of the respective property. It is also not in controversy that a part of the property in R.S.No.1833/14 came to the hands of the plaintiff, and all of them joined together to enter into an agreement for promotion under Ex.B4 on 16.4.1990. Following the same, all were parties to a plan, Ex.A7, which was placed before the M.M.D.A. for approval, and it has also been approved. Now, at this juncture, a perusal of the approved plan would clearly reveal that this portion of the property in respect of which plaintiff claims exclusive ownership, is shown as a vacant site. Now, the contention put forth by the learned Counsel for the respondents that had it not been shown as a vacant site, this plan would not have been approved requires consideration. In the instant case, whether the intention of the plaintiff at the time of entering into the agreement under Ex.B4 and also at the time of placing the plan, Ex.A7, before the M.M.D.A., was to retain the property as her property or to make it as part and parcel of the property on which the construction was to be raised has got to be tested. After perusal of the documents, this Court is of the considered opinion that the plaintiff had not the intention of retaining the property as her property; but, it was clubbed along with the other properties. At this juncture, it would be fit and proper to reproduce the undertaking given by the plaintiff under Ex.X4 which reads like this:

> "2. I will assure that the open space around the building, the usage of the building including the car parking in ground floor, will be kept as specified in the approved plan, and it will not be converted into any other use except the purpose for which it is kept open...."

What is mentioned therein is the vacant site. All the three owners have also signed in the undertaking. It is pertinent to point out that having been a party to such an undertaking to keep the vacant site as it is, now, the plaintiff cannot be permitted to say that she retained the ownership, though she was a party to such an undertaking.

15.The above contention is also affirmed in Ex.B5. A complaint was made by one of the flat purchasers as to the deviation of the plan. When it was made before the Consumer Redressal forum, the plaintiff was made as an opposite party, and she filed an affidavit which is found under Ex.B5. In Ex.B5, it is clearly mentioned that no portion of the land has been retained by third opposite party as alleged. This would clearly indicate

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that the plaintiff was also added as party because of the reason that a particular portion is also part and parcel of the property in question. When such a situation arose, the plaintiff came forward to file such an affidavit as mentioned above. Now, at this juncture, the plaintiff cannot be permitted to go against the undertaking given to the M.M.D.A., and also the affidavit filed before the Consumer Redressal Forum.

16.True it is, the property of the plaintiff is shown as a vacant site. By taking advantage of the situation that in the plan, it is shown as a vacant site, now, the plaintiff cannot be permitted to say that it was retained only as a vacant site and not as a passage to pass through, and hence, she is entitled to the property, and injunction should be granted. It has got to be answered simply that having been a party to the undertaking that the vacant site around the building is retained under the scheme, she cannot be permitted to go against the same. This situation is further strengthened by the original plan, which was placed by them for approval along with Ex.X1, the application, wherein the entire property of all the three owners is shown as the subject matter for approval. Having been a party for the entire property shown for approval, now the plaintiff cannot be permitted to go against the same to state that the property of the plaintiff shown as vacant site, was retained by her as owner.

17.Further, the contention of the appellant's side that under Ex.A8, the sale deed, items 1 and 2 shown in the original plan, are shown as properties sold; but, it does not refer to item No.3 shown in the original plan; that item No.3 refers to the plaintiff's property; and that the non-mention of item No.3 in Ex.A8, the sale deed, would clearly indicate that the property was not included and never belonged to the defendants cannot be countenanced in view of the application of Sec.6 (2) and (3) of the Tamil Nadu Apartment Ownership Act, 1994. It would be fit and proper to reproduce the provisions under Sec.6 (2) and (3) of the said enactment, as follows:

> "6.Common areas and facilities:
> (1).....
> (2)The percentage of the undivided interest of each apartment owner in the common areas and facilities, and in the limited common areas and facilities, if any, as expressed in the Deed of Apartment shall have a permanent character, and shall not be altered without the consent of all the apartment owners. The percentage of the undivided interest in such common areas and facilities and the limited common areas and facilities shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment whether or not such interest is expressly mentioned in the conveyance or other instrument.
>
> (3)The common areas and facilities and the limited common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any

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action for partition or division of any part thereof and any covenant to the contrary shall be null and void."

18.A reading of the above provision would clearly reveal that the non-mention of the conveyance will not in any way affect the right of the flat owners. So far as Sec.6(3) is concerned, it could be seen that once the construction has been made after the approval of the plan, and there is a vacant site, and it is also part and parcel of the scheme, all these flat owners are entitled to use the same. In such circumstances, the plaintiff could not claim any ownership over the same. Thus, the claim of the plaintiff who was a party to those proceedings, that the property was retained by her as owner of the property cannot at this stage stand. It is well settled proposition of law that once a particular property is made for a particular purpose and retained, even the owner is considered to be a trustee, and he cannot come forward to state that it is retained by him for his personal use, and hence, injunction could be granted. Under the circumstances, the contentions put forth by the appellant's side would fail both factually and legally. Therefore, the plaintiff is not entitled to the relief asked for.

19.So far as the counter claim is concerned, both the Courts have failed to consider that there is no question of ownership that would pass to the flat owners; but, they have got a right to pass through the passage. Under the circumstances, injunction to the extent of their passing through the passage has got to be affirmed. In respect of the other part as to the exclusive possession and enjoyment, the injunction granted by the lower Courts, has got to be set aside.

20.In the result, S.A.No.486 of 2006 is dismissed. So far as the counter claim is concerned, the respondents/defendants are entitled to use the property as a passage and pass through the same to reach Cutchery Road. To that extent, injunction granted by both the Courts below, are modified. Accordingly, S.A.No.485 of 2006 is disposed of. No costs. Consequently, connected CMPs are closed.

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To:

1)The Additional District Judge
  Fast Track Court No.V, Chennai.
2)The II Assistant Judge
  City Civil Court, Chennai.
3. The Section Officer,
VR Section, High Court, Madras

+ 2ccs to Mr. Duraikannan, Advocate sr no. 980
+2ccs to Mr. K. Sukumaran, Advocate sr no. 987 and 988
+2ccs to Mr. S. Uma Maheswari, Advocate sr no. 1098, 1097

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